IN THE

# Supreme Court of the United States



**October Term 1975**

**No.**

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**No. 75-1258**

WILLIAM BLACKIE, *et al.*,

*Petitioners,*

*vs.*

LEONARD BARRACK, *et al.*,

*Respondents.*

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**No. 75-1300**

TOUCHE ROSS & CO.,

*Petitioner,*

*vs.*

LEONARD BARRACK, *et. al.*,

*Respondents.*

---

**No. 75-1314**

WILLIAM E. ROBERTS and JOHN P. BUCHAN,

*Petitioners,*

*vs.*

LEONARD BARRACK, *et al.*,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DAVID BERGER
1622 Locust Street
Philadelphia, Pa. 19103
(215) 732-8000

MELVYN I. WEISS
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300

*Attorneys for Respondents*

*Of Counsel:*
DAVID BERGER, P.A.
*Attorneys at Law*
MILBERG & WEISS
JARED SPECTHRIE
GERALD J. RODOS
SYLVIA L. BECKEY

## INDEX TO BRIEF

## Table of Authorities

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This brief is submitted in opposition to three related petitions for writs of certiorari, which seek review of a

judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in these proceedings on September 25, 1975.

That decision dismissed the appeal of petitioner Touche Ross & Co. ("Touche Ross"), taken pursuant to 28 U.S.C. § 1291,[1] from an interlocutory class action certification order entered by the United States District Court for the Northern District of California. Dismissal of the appeal was required by the final judgment rule applied in accordance with well settled principles established by this Court and consistently followed by all the Circuit Courts. This Court has declined to review such principles on three recent occasions. *Touche Ross & Co.* v. *Fabrikant*, 96 S.Ct. 424 (1975); *Touche Ross & Co.* v. *Seiffer*, 96 S.Ct. 779 (1976); *Cessna Aircraft Co.* v. *White*, 96 S.Ct. 363 (1975). This petition raises no new reasons for review or for departure from the final judgment rule not present in those prior petitions.

The decision dismissing Touche Ross' § 1291 appeal also unanimously affirmed the class certification order, on appeals taken pursuant to 28 U.S.C. § 1292(b)[2] by the petitioners other than Touche Ross. Certiorari to review such affirmance should be declined in the absence of any showing of abuse of the District Court's exercise of discretion.

## Questions Presented

### *(a) With Respect to Petitioner Touche Ross*

Does an appeal lie under 28 U.S.C. § 1291 challenging the propriety of a trial judge's exercise of discretion in

[1] All statutory references are set forth in the Appendix. 28 U.S.C. § 1291 is at Appendix A-1.

[2] 28 U.S.C. § 1292(b) is set forth at Appendix A-1.



issuing an interlocutory order which found that the requirements of F.R.Civ.P. Rule 23(b)(3)[3] had been met where: the order is not separable from the merits; appellant has not demonstrated irreparable harm; the order will not materially alter the manner in which the action will proceed; and the order can be fully and effectively reviewed after final judgment?

With respect to petitioner Touche Ross, no controversy arises from that portion of the Circuit Court's opinion which, pursuant to 28 U.S.C. § 1292(b), reviewed and unanimously affirmed the District Court's finding that the requirements of F.R.Civ.P. Rule 23(b)(3) had been met. Touche Ross neither requested nor was granted certification pursuant to § 1292(b), and the Circuit Court expressly refused § 1292(b) review as to Touche Ross. Its appeal was dismissed solely upon the basis of 28 U.S.C. § 1291. Touche Ross does not contest the Circuit Court's exercise of discretion to deny § 1292(b) certification.

### *(b) With Respect to All Other Petitioners*

All petitioners other than Touche Ross have agreed to pay $7.75 million in cash to the class represented by respondents, in partial settlement of this action, and have agreed to withdraw their petitions for certiorari when such partial settlement has been judicially approved as required by F.R.Civ.P. Rule 23(e)[4] and becomes effective. On June 3, 1976, the District Court signed an order setting a date in late August 1976 for a hearing as to the fairness and adequacy of the settlement.

Judicial approval of the partial settlement will render moot the issue raised by all petitioners other than Touche

[3] The relevant provisions of F.R.Civ.P. Rule 23 are set forth at Appendix A-1.

[4] The provisions of F.R.Civ.P. Rule 23(e) are set forth in Appendix A-3.

Ross. That issue is whether the Circuit Court correctly affirmed, pursuant to 28 U.S.C. § 1292, the District Court's class certification order (1) where no abuse of discretion was shown in the District Court's finding that the requirements of F.R.Civ.P. Rule 23(a) and (b) were satisfied, and (2) where the legal principles applied were consistent with this Court's decisions and have been uniformly followed by the district and circuit courts in all the Circuits of this country, in regularly granting class status in security fraud actions substantially similar to this one.

## STATEMENT OF THE CASE

This litigation[5] was precipitated by Ampex's unexpected announcement in January 1972 of anticipated losses of $40 million for the fiscal year ended April 30, 1972. In August 1972, Ampex announced a loss of $89.6 million, out of a net worth of approximately $135 million. Touche Ross, who was Ampex's auditor, then withdrew its earlier published certification of Ampex's financial statements for the year ended April 30, 1971. Touche Ross also declined to certify Ampex's financial statements for the year ended April 30, 1972 because of stated fears that a material part of the $89.6 million loss reported for 1972 was in fact incurred in 1971 or earlier.

The amended complaint alleges that the defendants fraudulently induced plaintiffs and other members of the class to purchase Ampex securities at excessive prices by the issuance of annual and interim reports and other documents which failed to disclose the material facts leading to the subsequent huge write-offs. The named plaintiffs and intervenors purchased 10,000 shares of Ampex stock at a cost of over $149,000 during the class period certified by the District Court. The purchases were made at inflated prices and resulted in a loss to plaintiffs and intervenors in excess of $70,000.00.

[5] This action was brought under Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), and Rules 10b-5, 3a-3 and 13a-13 promulgated by the Securities and Exchange Commission pursuant to those sections. Plaintiffs have sued on behalf of the class of all persons who purchased securities of Ampex from May 2, 1970 to August 3, 1972. Defendants are Ampex, its officers and directors during the period and Touche Ross & Company, independent auditors for Ampex during the period. All of such parties are petitioners herein. The text of Section 10(b) and Rule 10b-5 are set forth in the Appendix, at A-3 and A-4.



The papers before the Circuit Court showed that there are only nine key documents alleged to be false and misleading. Those documents are Ampex's annual reports for 1970 and 1971, and its interim reports for 1970 and 1971. The other documents described in the complaint are for the most part reiterations of information contained in the annual and interim reports.

The complaint alleges that these nine documents—all of which were disseminated in written form to the public—omitted material facts with respect to, and misrepresented the valuation of, inventories, research and development costs, reserves for doubtful accounts and notes receivable and royalty payment liabilities, and the impact resulting from discontinuance of certain product lines. The misrepresentations and omissions were designed to and did cumulatively and substantially inflate reported income or reduce reported losses throughout the period.

## REASONS FOR DENYING THE WRIT

### Summary of Argument

Touche Ross' petition should be denied because the interlocutory class order from which it appealed under § 1291 was not a final order, and would not have been

appealable as an exception to the final judgment rule in any Circuit. There is no difference in opinion among the Circuits on that question, and accordingly, there is no controversy for this Court to now consider with respect to Touche Ross. Because Touche Ross neither requested nor was granted certification pursuant to 28 U.S.C. § 1292(b), it may not petition from the merits of the Circuit Court's affirmance of the class certification order.

With respect to the other petitioners, whose appeals were heard pursuant to 28 U.S.C. § 1292(b), the Circuit Court's affirmance of the interlocutory class certification order was not only proper, but was mandatory in the complete absence of any showing that the trial court abused its discretion in certifying the class.

It will be demonstrated that the Circuit Court's decision did not break new ground in its application of F.R.Civ.P. Rule 23 to claims arising under § 10(b) and Rule 10b-5. There are clear common issues of fact and law running throughout the period, of the same sort which the federal courts have regularly found more than sufficient to justify class treatment. The Circuit Court's opinion followed long established decisional law in finding that the reliance issues raised by petitioner did not outweigh the predominant common issues so as to affect class status, and in its decision that any conflicts involved were peripheral and of the sort found in every securities class action. Its decision that class treatment is superior to alternate treatment recognizes that in cases of this sort, a class remedy is the only effective remedy for large scale fraud injuring thousands of investors through written matter disseminated to the public.

In following the mainstream of decisional law that § 10(b) liability as regularly interpreted by the courts is amenable to class treatment, the Circuit Court adhered to



repeated statements by this Court that federal securities legislation and § 10(b) in particular should be construed not technically and restrictively, but flexibly to effectuate the congressional purposes. The Circuit Court acted in a manner consistent with the statement in *Blue Chip Stamp Co.* v. *Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917 (1975), that the court was not abandoning the investing public who were victims of fraud. (*Blue Chip,* concurring opinion fn. 5). In addition, the Circuit Court's opinion carefully followed the instructions of *Blue Chip* and *Ernst & Ernst* v. *Hochfelder,* — U.S. —, 96 S.Ct. 1375 (1976), to follow established decisional law so as not to enlarge the class of persons protected by the federal securities laws beyond those whom Congress intended to protect.

**1. With Respect to Touche Ross there is No Controversy for This Court to Now Consider Because the Instant Class Order Would Not be Appealable Under § 1291 as a Final Order in any Circuit.**

The Circuit Court's opinion makes it clear that Touche Ross' appeal was required to be dismissed pursuant to 28 U.S.C. § 1291 under the standards established by this Court and applied by all of the Circuit Courts of Appeal (see footnote 8 of opinion).

In an attempt to manufacture a controversy ripe for consideration by this Tribunal, Touche Ross suggests that there may be a conflict among the Circuits on the § 1291 appealability of class orders. No such conflict exists. More important, such a conflict would be moot in this case, because the Circuit Court expressly considered the standards of appealability followed by all the Circuits, and found that petitioner's appeal would not be permitted anywhere.

The crucial importance of the final judgment rule, 28 U.S.C. § 1291, to the efficient and just administration of the

Federal judicial system, *Cobbledick* v. *United States*, 309 U.S. 323 (1940), permits a departure from that rule only in a narrow category of cases where the non-final order appealed (1) is separable from and collateral to the claims asserted in the action, (2) would finally determine the collateral question, and (3) would result in irreparable harm by any delay in appeal. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

With only one exception, later overruled[6], the Circuit Courts have unanimously held that an appeal from an order certifying a class does not fit within the *Cohen* collateral order doctrine, described *supra,* and would be contrary to the final judgment rule. *In Re U.S. Financial Securities Litigation,* — F.2d — (9th Cir. 1975), *cert. denied,* 96 S.Ct. 424 (1975); *White Industries, Inc.* v. *Cessna Aircraft Co.*, 518 F.2d 213 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 363 (1975); *Seiffer* v. *Topsy's International, Inc.*, 520 F.2d 795 (10th Cir. 1975), *cert. denied,* 96 S.Ct. 779 (1976); *Kramer* v. *Scientific Control Corp.*, — F.2d — (3d Cir. April 20, 1976); *Handwerger* v. *Ginsberg*, 519 F.2d 1339 (2d Cir. 1975); *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Walsh* v. *City of Detroit*, 412 F.2d 226, 227 (6th Cir. 1969); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972).

[6] The overruling of *Herbst* v. *International Telephone & Telegraph Co.*, 495 F.2d 1308 (2d Cir. 1974), is discussed *infra. Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), is no exception. The Circuit Courts there had accepted jurisdiction on the basis of jurisdiction retained from a prior appeal. 479 F.2d 1005 (2d Cir. 1973). This Court considered there only questions relating to the imposition of costs of notice and the manner of giving notice, because those were the only collateral issues which fell within the *Cohen* collateral order doctrine. No such collateral issues are found here.



Those decisions have uniformly held that a discretionary order pursuant to F.R.Civ.P. 23(b)(3) is not separable from or collateral to the merits, because of the required findings with respect to the existence and predominance of common questions, the typicality of plaintiff's claim, and the like.[7]

*Herbst* v. *International Telephone & Telegraph Co.*, 495 F.2d 1308 (2d Cir. 1974), has been the only case allowing a § 1291 appeal from an order certifying a class. It held that a class order may be appealable when: (1) the class determination is "fundamental to the further conduct of the case", (2) the order is "separate from the merits", and (3) it will result in "irreparable harm to the defendant in terms of time and money spent in defending a huge class action." 495 F.2d at 1312.

Two of the three judges concurring in the decision issued separate opinions expressing "grave doubts" and "persistent perturbations" as to the propriety of accepting a § 1291 appeal from an order certifying a class action, and concurred primarily because *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*Eisen* IV), was then pending before this Court.[8]

Approximately a month after the briefing was complete and oral argument took place on petitioner's appeal to the Circuit Court herein, the Court of Appeals for the Second Circuit in effect overruled *Herbst*. In *Parkinson* v. *April Industries, Inc., supra,* the Court noted that an appeal on the same facts as *Herbst* would no longer be permitted, 520 F.2d at 658, fn. 9, and affirmed the general non-

[7] Petitioners attack the Circuit Court's findings in these areas. (Touche Ross brief, pp. 6, 10-13, 17-18).

[8] This Court's subsequent decision in *Eisen* IV reaffirmed the exceptional circumstances required in order to invoke the *Cohen* collateral order doctrine.

appealability under § 1291 of orders such as that involved here, stating:

> "Our court in *General Motors* recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met." 520 F.2d at 658.

Without benefit of the *Parkinson* clarification of the Second Circuit's position, the Circuit Court's decision herein considered the *Herbst* three-prong test. Rejecting it, just as *Parkinson* did, the Court nonetheless found that even under that test, a § 1291 appeal probably would not lie. The decision noted (footnote 8) that the first criteria, that the class determination be "fundamental to the further conduct of the case", may not be satisfied because "including intervenors, the named plaintiffs purchased 10,000 shares during the class period and damages would appear to be such that the action would proceed were the order reversed". In addition, the Circuit Court noted that "in this case, the second criteria [that the order be "separable from the merits"] is probably not met either", citing two Second Circuit decisions, *Kohn* v. *Royall Koegel & Wells,* 496 F.2d 1094 (2d Cir. 1974), and *General Motors* v. *City of New York,* 501 F.2d 639 (2d Cir. 1974).

That a § 1291 appeal would not lie in the only Circuit ever to accept such an appeal demonstrates that Touche Ross' claim of conflict among the Circuits is contrived merely to give the appearance of a controversy. But there is no controversy. Petitioner's position is moot, for its appeal would not have been accepted by any of the Circuit Courts of Appeal. Accordingly, there is nothing for this Court to review with respect to the dismissal of Touche Ross' § 1291 appeal.



### 2. The § 1292 Affirmance as to the Other Petitioners Was Required in the Absence of a Showing that the District Court Abused its Discretion in Certifying a Class.

It is well settled, and requires no review by this Court, that determination of a class action motion will not be disturbed on appeal in the absence of a showing that the trial court abused its discretion.

> "As was stated in *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969) 'the judgment of the trial court should be given the greatest respect and the broadest discretion, particularly if . . . he has canvassed the factual aspects of the litigation.' This is so because the district court is in the best position to consider the most fair and efficient procedure for conducting any given litigation. Such a determination by the court will not be disturbed unless the party challenging it can show an abuse of discretion." *Price* v. *Lucky Stores, Inc.,* 501 F.2d 1177, 1179 (9th Cir. 1974).

Accord, *City of New York* v. *International Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Clark* v. *Watchie,* 513 F.2d 994, 1000 (9th Cir.), *cert. denied,* 96 S.Ct. 72 (1975); *Wilcox* v. *Commerce Bank of Kansas City,* 474 F.2d 336 (10th Cir. 1973); *Castro* v. *Beecher,* 459 F.2d (1st Cir. 1972); *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F.2d 909 (9th Cir. 1964); *Rutledge* v. *Electric Hose & Rubber Co.,* 511 F.2d 668 (9th Cir. 1975); *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126, 139 (7th Cir. 1974); *Wetzel* v. *Liberty Mutual Ins. Co.,* 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), *cert. denied,* 407 U.S. 925.

The above cited decisions recognize that any determination of the predominance of common questions and superiority of class action, as well as of the adequacy of representation is intertwined with the specific facts of a case, and that the District Court alone is in the position to continuously reassess its initial decision on a developing record. It is for that reason that the Circuit Courts have been loathe to interfere with class approval, particularly on interlocutory review. *E.g., Thill Securities Corp.* v. *New York Stock Exchange, supra,* at 17.

The petitioners did not sustain their burden of showing any abuse of the trial court's exercise of discretion in determining the class motion. That determination was made after extensive briefing and argument. As the Circuit Court decision noted, the trial court analyzed the allegations of the complaint and other material sufficient to form a reasonable judgment on each of the requirements of F.R.Civ.P. Rule 23, and considered the nature and range of proof necessary to establish these allegations, before determining that the requirements were met. In addition, as demonstrated below, the trial court properly applied the criteria of Rule 23 by utilizing established principles of law which have been uniformly followed by the courts in all Circuits since the inception of F.R.Civ.P. Rule 23, in granting class status in cases substantially similar to this one.

**3. The District Court and the Circuit Court Properly Applied Established Legal Criteria In Determining That the Requirements of F.R.Civ.P. Rule 23 Were Met.**

Defendants' primary attacks upon the propriety of class certification are: (1) that the case did not present common questions of fact and law; (2) that direct individual proof of subjective reliance was required by each class member in order to establish 10b-5 liability, so that predominant



individual issues overshadowed the common questions of law and fact which are inherent in the case; and (3) that proof of liability or damages might create conflicts among class members and with the named plaintiffs sufficient to make representation inadequate. Both the District Court and the Circuit Court rejected these contentions. In doing so, they followed long established legal principles adhered to virtually uniformly by almost all the District Courts in granting class status on facts substantially similar to those here despite objections identical to those raised by petitioners herein. The uniformity of such decisions argue for denial of review by this Court. *Blue Chip Stamp Co.* v. *Manor Drug Stores, supra,* at 95 S.Ct. 1923, 1924.

**(a) *Common Questions of Law and Fact Were Properly Found to Exist.***

The allegations of the complaint and the facts before both the District and Circuit Courts demonstrated clearly that common questions existed throughout the entire class period. The Circuit Court noted (opinion, fn. 19) that because plaintiffs alleged at least three specific strands of omission or misrepresentation running throughout the financial statements of the class period, the action was well within the boundaries of commonality delineated by the Courts, and no extension of previously set limits was required. The specific strands to which the Court referred are the failure to create adequate reserves for uncollectible accounts receivable and contractually guaranteed royalty payments, and the overstatement of inventory. Ampex's 1972 annual report showed write-downs of $31.9 million as provision for royalty guarantees, $11.8 million for uncollectible accounts receivables and $15 million for inventory. The complaint alleges and discovery to date demonstrates that these adjustments trace back to undisclosed problems in the beginning of the class period. This is supported by Touche

Ross' withdrawal of its certification of the 1971 report because of uncertainty as to whether the huge losses reported in 1972 were attributable to earlier years. The failure to establish appropriate reserves for uncollectible accounts and for royalty guarantees and the overstatement of inventory all served to artificially inflate Ampex's earnings and net assets throughout the period. This inflation is common to every purchaser and damaged every purchaser in the same manner. The Circuit Court properly noted that the artificial inflation persisted throughout the entire class period, ceasing only when the appropriate reserves were established and disclosed in the 1972 Annual Report.

Both the District Court and the Circuit Court correctly found that the consistent disregard of accounting principles underlying these matters raised common questions of law and fact with respect to the entire class for the whole class period. The Circuit Court also found that even if one assumed the reserves to be inadequate and the inventory overvalued by varying amounts throughout the class period, there still would remain common questions of law and fact with respect to the proper application of the accounting principles used to establish such reserves.

In so finding, the Circuit Court followed the overwhelming weight of authority, which holds that repeated misrepresentations of the sort alleged here satisfy the "common question" requirement of F.R.Civ.P. Rule 23 and that minor differences in the position of various class members do not affect this commonality. *Green* v. *Wolf Corporation*, 460 F.2d 291, 298 (2d Cir. 1968); *Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968); *Harris* v. *Palm Springs Alpine Estates*, *supra*; *In re U.S. Financial Securities Litigation*, 64 F.R.D. 443 (S.D.Cal. 1974) *app. dismissed* — F.2d — (9th Cir. 1975), *cert. denied*, 96 S.Ct. 424 (1975); *Aboudi* v. *Daroff*, 65 F.R.D. 388 (S.D.N.Y. 1974); *Werfel* v. *Kramarsky*, 61 F.R.D. 674 (S.D.N.Y. 1974); *In re Memorex Security Cases*, 61 F.R.D. 88 (N.D.Cal. 1973); *Siegel* v. *Realty Equities Corporation of New York*, 54 F.R.D. 420 (S.D.N.Y. 1972); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *Siegel* v. *Chicken Delight, Inc.*, 271 F.Supp. 722 (N.D.Cal. 1967); *Fischer* v. *Kletz*, 41 F.R.D. 377, 381 (S.D.N.Y. 1966); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966). This is consistent with the views of the Advisory Commission on the Rule: "fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . .". Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil Porcedure, 39 F.R.D. 69, 103 (1966).



The longstanding uniformity of opinion among the Circuit and District Courts on this question argues for its correctness, *Blue Chip Stamp Co.* v. *Manor Drug Co.*, *supra*, and requires no review by this Court.

### (b) *Courts Have Uniformly Rejected Contentions Which Would Permit Reliance or Damage Issues to Predominate Over Common Issues of Law and Fact.*

The arguments which petitioners raise as to the effect on predominance of reliance and damages have been rejected by virtually all courts to whom they have been presented. Even before standards of reliance were clarified by this and other courts—so that the possibility of individual proof of reliance existed—federal courts have not permitted that issue to bar class treatment, particularly where they had determined the existence of a "common nucleus" of facts such as are present in this case. *Green* v. *Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied sub nom.*, *Troster, Singer & Co.* v. *Green*, 395 U.S. 977

(1969); *Herbst* v. *International Telephone and Telegraph Corporation*, 65 F.R.D. 13 (D.Conn. 1973), *aff'd*, 495 F.2d 1308 (2d Cir. 1974); *Korn* v. *Franchard Corporation*, 456 F.2d 1206, 1212-13 (2d Cir. 1972); *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D.La. 1970); *In re National Student Marketing Litigation*, CCH Fed.Sec.L.Rep. ¶ 94,165 (D.D.C. 1973); *In re Penn Central Securities Litigation*, 347 F.Supp. 1327 (E.D.Pa. 1972), *aff'd on other grounds*, 494 F.2d 528 (3d Cir. 1974); *Feder* v. *Harrington*, 52 F.R.D. 178, 183 (S.D.N.Y. 1970); *Mersay* v. *First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y. 1968); *Weiss* v. *Tenney Corporation*, 47 F.R.D. 283 (S.D.N.Y. 1969); *Fogel* v. *Wolfgang*, 47 F.R.D. 213 (S.D.N.Y. 1969); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967); Comment, Reliance Upon Rule 10b-5: Is The "Reasonable Investor" Reasonable? 72 *Colum. L. Rev.* 562, 577-79 (1972).

The reason for this long accepted rule was stated in *Dolgow* v. *Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), as follows:

> "In spite of this abundance of common questions, defendants argue that each member of the class would have to prove reliance, compliance with the statute of limitations, and damages, and thus the common questions cannot be said to predominate over those affecting individual members. To 'acknowledge defendants' position at this point would be, in effect, an emasculation of the vitality and pliability of the amended rule.' Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 727 (N.D. Cal. 1967). The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible.



> "In fact, in the present case, these individual questions present 'no difficulty not inherent in every securities class action.' Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966). See, e.g., Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964); Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966); Brennan v. Midwestern United Life Ins. Co., 259 F.Supp. 673 (N.D. Ind. 1966)." 43 F.R.D. at 490.

Accord: *Herbst* v. *International Telephone and Telegraph* Corporation, 65 F.R.D. 13, 18-19 (D.Conn. 1973), *aff'd*, 495 F.2d 1308 (2d Cir. 1974).

It is certain that any other view would cripple F.R.Civ.P. Rule 23 in precisely those situations where the Advisory Committee believed it most useful, such as where a large number of investors have been defrauded in the same manner by the same or similar written statements.

Plainly then, even if petitioners were correct that reliance were individually at issue, the critical common questions of law and fact associated with the proof of omissions and misrepresentations would predominate. Petitioners' long exposition on reliance is therefore extraneous to the class determination.

In any event, both the District Court and the Circuit Court followed established case law in rejecting petitioners' contention that individualized proof of subjective reliance is required by each class member in order to establish a claim pursuant to Rule 10b-5.

This Court itself initiated the rule that individualized proof of subjective reliance is not required in an action in which omissions played a key role, because the obligation to disclose and failure to disclose establish the requisite element of causation in fact. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Mills* v. *Electric Auto-Lite Co.*,

396 U.S. 375 (1970). Omissions with respect to the accounts receivable reserves, inventory overstatement and royalty reserves are at the heart of this case. The *Ute* rule is appropriate here also because Ampex's directors and auditors stood in a fiduciary relationship to its shareholders similar to that occupied by defendants in *Affiliated Ute Citizens*.

The Circuit Court held that individual proof of subjective reliance is not required because it imposes an unnecessarily difficult, irrelevant and redundant evidentiary burden, "addressed to a speculative possibility in an area where motivations are complex and difficult to determine". Such a burden would require "proof of a speculative negative (I would not have bought had I known) precisely parallel to that held unnecessary in *Affiliated Ute* and *Mills* . . .". That is the same sort of speculative proof that this Court discouraged in *Blue Chip Stamp Co., supra.* The Circuit Court found that "the [required] causal nexus can be adequately established indirectly [and objectively], by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock". That is particularly appropriate in open market purchases such as involved here, where all purchasers at inflated prices are damaged in the same manner, because the price paid reflects the material misrepresentations or omissions irrespective of whether the particular purchaser subjectively relied on a particular representation when purchasing.

The identical principle—that deception affecting the open market price of securities makes individualized proof of reliance unnecessary—was endorsed in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 374 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973):

> "Where the transaction is accomplished through impersonal dealings, such as on a stock exchange, or for some other reason the factors that influenced the parties are not readily apparent, the decisions have discussed liability in terms of the 'materiality' of the misrepresentation. See Heit v. Weitzen, 402 F.2d 909, 913 (2 Cir. 1968), cert. denied, 395 U.S. 903 (1969); List v. Fashion Park, Inc., supra, 340 F.2d at 462-64; Kahan v. Rosenstiel, 424 F.2d 161, 173-74 (3 Cir. 1970). This constructive reliance principle is particularly appropriate in class actions where proof of actual reliance by numerous class members would be impracticable. Kahan v. Rosenstiel, supra.
>
> "The [Supreme] Court [in *Mills*] established a presumption of reasonable reliance in order to avoid an overly difficult burden of proof. This was to encourage the vigorous enforcement of the securities laws through shareholder suits, and to effectuate the congressional purpose of enabling shareholders to make informed decisions 'by resolving doubts in favor of those the statute is designed to protect'. Id."



Accord: *Herbst* v. *International Telephone & Telegraph Co.*, 495 F.2d 1308, 1315 (2d Cir. 1974). Wrongful inflation of the open market price of Ampex securities is the gist of this action.

Decisions in other Circuits similarly have seen no need for individual proof of subjective reliance. *Woolf* v. *S.D. Cohn & Co.*, 515 F.2d 591, 614 (5th Cir. 1975), *rehearing and rehearing en banc denied*, 521 F.2d 225 (1975) (plaintiffs "must show that the omissions or misrepresenta-

tions . . . were such that a reasonable investor, had the information registration would have afforded been available, might have considered them important in the making of his investment decision. They need not show that they themselves would have relied . . ."); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 288-91 (3d Cir. 1972), *cert. denied*, 409 U.S. 874 (1973); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950; *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 381 (2d Cir. 1974); *Competitive Associates, Inc.* v. *Laventhol, Krekstein, Horwath & Horwath*, 516 F.2d 811, 814 (2d Cir. 1975); *In re Penn Central Securities Litigation, supra; Taylor* v. *Smith Barney & Co.*, 358 F.Supp. 829 (D. Utah 1973); *Davis* v. *Avco Corp.*, 371 F.Supp. 782, 792 (N.D. Ohio 1974); *Seiffer* v. *Topsy's International, Inc.*, 64 F.R.D. 714, 718 (D.Kans. 1974), *app. dism.*, 520 F.2d 795 (10th Cir. 1975), *cert. denied*, 96 S.Ct. 779 (1976); *Fischer* v. *Wolfinbarger*, 55 F.R.D. 129, 132 (W.D.Ky. 1971); *Livesay* v. *Punta Gorda Isles, Inc.*, 379 F.Supp 386, 387 (E.D.Mo. 1974).

The principle that individual proof of subjective reliance is not required in 10b-5 actions where omissions play a material role, or where the open market price of publicly traded securities was artificially inflated, or where a deliberate scheme to defraud is shown is consistent with the language of § 10(b) and with Rule 10b-5, neither of which provide that reliance is a requisite to recovery. The early decisions which judicially engrafted the notion of reliance into the statute and rule did so to insure a causal nexus between the alleged wrong and damage to the claimant. Evidence of the same causal relationship is more easily and objectively obtained by proof of materiality of misrepresentations or omission and resultant inflation in the price of the security purchased. This eliminates the sort of speculative subjective and non-certain proof which was one of the targets in this Court's decision in *Blue Chip, supra*.



The Circuit Court's view on reliance did not alter the substantive law of Section 10(b) but was merely an evidentiary rule allowing the causal nexus between the fraud and the loss of investors to be proved in a more efficient manner. The Circuit Court was clear that its evidentiary rule with respect to causation would be applied to private as well as class actions, and was independent of Rule 23 so that the Enabling Act does not come into play.

Moreover, the Circuit Court found that any right to attempt to disprove such causation would not render this action unmanageable. The Court merely cautioned that utilization of such right for purposes of delay and harassment might be limited by the trial court. The trial court traditionally has had the power to control the trial of the cases before it so as to exclude repetitive evidence and similar delaying tactics. (Opinion, fn. 22). The Federal Rules of Evidence, Rule 403 [9], explicitly give such power to the trial judge. The Circuit Court's cautionary statement raises no present controversy requiring review by this Court. Defendants have not yet demonstrated an intention to delay the trial of the causation issue herein by fruitless fishing expeditions, introduction of repetitive evidence or any of the other tactics against which the Circuit Court warned, nor has the trial court yet had to rule on the problem. If petitioners do not attempt to obstruct the trial in such a manner, resolution of this issue will not be required in this case. Accordingly, consideration of the issue is premature at this time.

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[9] Rule 403 provides that: "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

**(c) *Courts Have Regularly Rejected Contentions That Proof of Liability or Proof of Damages in Actions Such as This Will Create Conflicts Among Class Members or with Named Plaintiffs.***

The District Court and Circuit Court rejected petitioners' contentions that the interest of class members in proving damages from price inflation and in proving the materiality of misrepresentations causing said inflation are in conflict, and thus constitute grounds for refusing to certify the class. Petitioners argued that some class members will desire to maximize inflation existing on a given date while others will desire to minimize it. Courts faced with the same contentions have repeatedly rejected that position, for that potential conflict is present in all class actions involving a series of misrepresentations over a prolonged period. *Green* v. *Wolf Corporation, supra; Tucker* v. *Arthur Andersen & Co.*, CCH Securities Law Rep. ¶ 95,107 at 97,931-97,932 and 97,932 n. 14, and cases there cited, and at 97,936 (S.D.N.Y. 1975); *Aboudi* v. *Daroff, supra; In re U.S. Financial Secuirties Litigation*, 64 F.R.D. 433 (S.D.Cal. 1974); *Grad* v. *Memorex*, 61 F.R.D. 88 (N.D. Cal. 1973); *In re Caesar's Palace Securities Litigation*, 360 F.Supp. 366 (S.D.N.Y. 1973); *Siegel* v. *Realty Equities Corporation of New York, supra; Dolgow* v. *Anderson, supra; Fischer* v. *Kletz, supra.*

The aforementioned cases show that even if a potential conflict exists, such conflict is not sufficient reason to deny class status, because Rule 23 expressly provides devices to deal with such conflicts when they become real rather than potential, by the designation of subclasses. For instance, in *Herbst* v. *ITT, supra,* the District Court declined to disallow a class because of possible differences in the measurement of damages. It noted that, "If it appears at some time in the future that the proper allocation of damages would



be effectuated by the designation of subclasses, it is undisputed that the Court has all the power necessary to implement such a procedure." 65 F.R.D. at 17. The Second Circuit in *Green* v. *Wolf Corporation, supra,* 406 F.2d at 299, observed that:

> "If the trial court finds at some convenient time that a distinction must be drawn between those who purchased at different times, it is free to make use of the flexibility available to it. . . . For example, it may divide the class into subclasses . . . Rule 23(c)(4), or make such other orders as are necessary, Rule 23(d). Compare Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966) in which the Court concluded it could cope with a class action, although the securities in question had been purchased at different times, under varying circumstances, and in response to separate representations, some oral and some written."

What petitioners are really arguing is that the more massive the fraud perpetrated and the longer the time period involved, the more unsuitable the case for class treatment because of inherent conflicts arising from the length of the period and the fluctuations of the price of the stock during that period. To accept their arguments "would encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre" of conflicts and manageability problems to defeat the class action. *Grad* v. *Memorex, supra,* at 103.

As the Circuit Court accurately noted, petitioners' position with respect to conflicts "depends entirely on adoption of the out-of-pocket loss measure of damages rather than a rescissionary measure". It held that it is within the discretion of the District Judge in appropriate circumstances to apply a rescissionary measure of damages, *Chasins* v. *Smith*,

*Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970); *Abrahamson* v. *Fleschner*, 392 F.Supp. 740, 746 (S.D.N.Y. 1975); see Note, *the Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 *Stan. L. Rev.* 371, 374-376 (1974); Bromberg, Securities Law, Fraud, Rule 10b-5, ¶ 9.1, at 226, or to allow consequential damages, *Zeller* v. *Bogue Elec. Mfg. Co.*, 476 F.2d 795, 802-803 (2d Cir. 1973), which would *per se* eliminate any potential conflict. Moreover, the Court correctly discerned that even if an out of pocket standard applies, conflict can be eliminated at the appropriate time by the creation of subclasses. *Green* v. *Wolf Corporation, supra*, at 299; *Tucker* v. *Arthur Andersen & Co., supra; Handwerger* v. *Ginsberg, supra; In re Caesar's Palace Securities Litigation, supra*, at 398; *Sol S. Turnoff Drug Dist. Inc.* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 51 F.R.D. 227, 233 (E.D.Pa. 1970); *Hawk Industries, Inc.* v. *Bausch and Lomb*, 59 F.R.D. 619 (S.D.N.Y. 1973).

**4. The Circuit Court's Decision Falls Well Within Boundaries Established by This Court with Respect to Section 10(b) and Rule 10b-5 and with Respect to F.R.Civ.P. 23. It does not Enlarge the Class of Persons Intended to be Protected by those Statutes and Rules**

The Circuit Court's decision did not break new ground in its application of Section 10(b), Rule 10b-5 or F.R.Civ.P. 23. Thus, this case is entirely unlike *Blue Chip Stamp Co.*, where, in order to impose liability, this Court would have been required to overrule a series of cases stretching back over 20 years, and implicitly endorsed by Congress, which regularly followed the "purchaser-seller" requirement first enunciated in *Birnbaum* v. *Newport Steel*, 193 F.2d 461 (2d Cir. 1952).

The Circuit Court's decision which petitioners ask this Court to review, did not change or extend established law and did not enlarge the class of potential plaintiffs, but limited them to those who have traditionally been found to



be the persons which Congress intended to protect in enacting the federal securities laws.

This case is consistent with *Ernst & Ernst* v. *Hochfelder*, 96 S.Ct. 1375 (1976), for the complaint alleges and the discovery to date demonstrates fraud, and not mere negligence.

This Court has ruled that flexible interpretation of Rule 23 is necessary to insure effectuation of the purposes of litigation efficiency and economy that the Rule, in its present form, was designed to serve. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court specifically held the flexible interpretation of Rule 23 was justified in order to effectuate the purposes of the federal anti-trust laws.

While no broadening of Rule 23 was required for class status in the instant action, it is appropriate to note that this Court has on many occasions instructed that the federal securities laws must be enforced flexibly in order to protect the American investing public. This Court has squarely stated, numerous times, that congressional securities legislation enacted for the purpose of avoiding frauds should be construed "not technically, and restrictively, but flexibly to effectuate the congressional purposes". *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963); *Superintendent of Insurance of the State of New York* v. *Bankers Life and Casualty Company*, 404 U.S. 6, 12 (1971). Accord: *Affiliated Ute Citizens* v. *United States, supra.* Identical philosophy was announced by this Court in *Mills* v. *Electric Auto-Lite Company, supra*, at 382-383, where this Court further stated that shareholders should not be discouraged from the private enforcement of the securities rules which "provides the necessary supplement to Commission action", citing *J.I. Case* v. *Borak*, 377 U.S. 426, 432 (1964). The latter case makes it clear that "it is the duty of the court to be

alert to provide such remedies as are necessary to make effective the congressional policy".

As this Court noted in *Ernst & Ernst* v. *Hochfelder, supra,* federal regulation of transactions and securities emerged as part of the aftermath of the market crash of 1929 and was, *inter alia,* designed to provide investors with full disclosure of material information, to protect investors against fraud, and to promote ethical standards of honest and fair dealing. *Hochfelder, supra,* 96 S.Ct. at 1381-82. The fraudulent Ampex financial reporting which is the subject of this lawsuit, which deliberately omitted to disclose serious problems in an effort to artificially inflate income and thus inflate the price of its stock, is precisely the type of activity the federal securities laws in general, and Section 10(b) in particular, were designed to prevent.

Accordingly, it was appropriate that the District and Circuit Courts followed the teachings of this Court in being alert to provide such remedies as are necessary to make effective the congressional purpose. Traditionally, class actions have been an important means of vindicating the congressional policy underlying private enforcement of the federal securities laws. In *Hohmann* v. *Packard Instruments Co.,* 399 F.2d 711 (7th Cir. 1968), the Court, citing its prior decision in *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 90 (7th Cir. 1941), reasoned that:

> "to permit the defendants to contest liability with each claimant in a single separate suit would . . . give defendants an advantage which would be almost equivalent to closing the doors of justice to all small claimants. This is what we think the class suit was [intended] to prevent."

The importance of protecting investors and securing compliance with the securities laws has been a repeated factor in decisions by our courts permitting class actions. *Harris* v. *Palm Springs Alpine Estates,* 329 F.2d 909 (9th Cir. 1964); *Green* v. *Wolf Corp., supra; Esplin* v. *Hirschi, supra.* The latter case stated:



> "Since the effectiveness of the federal securities laws may depend in large measure on the application of the class action device, 'the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action' ".

Private securities litigation such as this is now "commonly determined by means of a class action." *Hawk Industries, Inc.* v. *Bausch & Lomb, Inc.,* 59 F.R.D. 619 (S.D.N.Y. 1973). The results in practice have been more than satisfactory. The effect of securities, class action litigation is assessed, as follows, in a Report adopted by the Association of the Bar of the City of New York:

> "The precise effect which class actions have had upon the financial community cannot be measured. It is no overstatement that cases such as *Escott* v. *Barchris Construction Corp.,* 283 F.Supp. 643 (S.D.N.Y. 1968) and *Feit* v. *Leasco Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971) have had a profound —and beneficial—influence upon the diligence of directors, underwriters, accountants, lawyers and others connected with the public offering of securities." [10]

Effective protection of investors injured by published misrepresentations, and vindication of the public interest in a reliable securities market, require class action certification in cases such as this.

Despite petitioners' hue and cry about an alleged *"in terrorem"* effect of Rule 23, we seriously doubt that the

[10] Class Actions, Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements. Association of the Bar of the City of New York (1973), p. 16.

petitioners who have agreed to pay $7.75 million in partial settlement of the suit are paying such money for that reason. Their careful avoidance of any real discussion of the facts of the case supports this position. We believe that the merit of their argument was accurately discerned by the Circuit Court. It noted that the limited empirical evidence on the subject indicates that a relatively high proportion of the class actions are not settled, but are disposed of on preliminary motions in defendants' favor. The indication is that if defendants truly believed their proclaimed innocence, their appropriate remedy would be to move for summary judgment. The Court also noted that on the basis of the evidence before it, the Commerce Committee of the United States Senate concluded that the class action was not a particularly effective vehicle for coercing settlement. The Court concluded that the present hue and cry of "blackmail" may in fact merely be "the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injuries occasioned by defendants alleged violation of the law) on more equal grounds."

Judge Weinstein, formerly a professor of civil procedure at Columbia University Law School and now a district judge who has seen class actions through trial,[11] has sounded the warning that class actions "touch on the credibility of our judicial system. . . . Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights . . . and investors who are victimized by insider trading or misleading information—or are not." Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299 (1973).

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[11] See, *e.g., Feit* v. *Leasco Data Processing Equipment Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971).



## Conclusion

Because the Circuit Court's finding of class status falls within established parameters regularly followed by our Courts, breaks no new ground, and at the same time is consistent with this Court's policy of utilization of the class action vehicle as an appropriate remedy for vindicating congressional purpose in enacting the federal securities laws, there is no need for this Court to review the Circuit Court's decision. In addition, dismissal of Touche Ross' § 1291 appeal was proper. Accordingly, the petitions for Writs of Certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

David Berger
1622 Locust Street
Philadelphia, Pa. 19103
(215) 732-8000

Melvin I. Weiss
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300
*Attorneys for Respondents*

*Of Counsel:*
David Berger, P.A.
*Attorneys-at-Law*
Milberg & Weiss
Jared Specthrie
Gerald J. Rodos
Sylvia L. Beckey

# APPENDIX

## APPENDIX

**(a) 28 U.S.C. § 1291 provides:**

"FINAL DECISIONS OF DISTRICT COURTS—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

**(b) 28 U.S.C. § 1292(b) provides in relevant part:**

"INTERLOCUTORY DECISIONS . . .

(a) . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . .".

**(c) F.R. Civ. P. 23 provides, in relevant part:**

"RULE 23. CLASS ACTIONS—(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder

of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (c) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."



**(d) F.R. Civ. P. Rule 23(e) provides:**

Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**(e) Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) provides in relevant part as follows:**

Manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**(f) Rule 10b-5 (17 C.F.R. § 240.10b-5) provides as follows:**

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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